FOR ARGUMENT

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July 15, 1989

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RE: McKoy v. North Carolina
No. 88-5909

Dear Mr. Spaniol:

Enclosed please find the manuscript copy of the Reply Brief for the Petitioner and my Certificate of Service in the above-named case.

Thank you.

Sincerely,

Malcolm Ray Hunter

Malcolm Ray Hunter, Jr.
Appellate Defender

MRHjr.:jb

cc: Ms. Joan H. Byers

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5909

DOCK McKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Malcolm Ray Hunter, Jr., a member of the bar of this Court hereby certify that on July 15, 1989, one copy of the Reply Brief for Petitioner was mailed, first-class postage prepaid, to: Joan H. Byers, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, Attorney for Respondent. I further certify that all parties required to be served have been served.

This the 15th day of July, 1989.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DOCK McKOY, JR.,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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ARGUMENT

A. THE DECISION IN MILLS CONTROLS THIS CASE.

Respondent's entire brief rests upon a false interpretation of *Mills v. Maryland*, 486 U.S. ___, 100 L.Ed.2d 384 (1988). According to the respondent:

> The concern in *Mills* was not whether Maryland could, consistent with the eighth amendment, require unanimity as to the finding of mitigating factors. Rather, *Mills* involved possible ambiguity in instructions concerning the further use and consideration of evidence conceded to be relevant under Maryland law.

(Brief for Respondent at 16). Thus, says the respondent, "[i]t is the absence of ambiguity in the sentencing instructions that renders *Mills* not controlling in this case." *Id.* at 17.

This construction of *Mills* ignores "the rationale of the *Mills* decision as expressed by the opinion itself." J.A. 83, *State v. McKoy*, 323 N.C. 1, 51, 372 S.E.2d 12, 43 (1988) (Exum, C.J., dissenting). The majority opinion in *Mills* begins its analysis by setting out two "intuitively disturbing" hypothetical situations, in each of which the jury's consideration of mitigating evidence is foreclosed by the failure of all twelve jurors to agree in finding any particular mitigating circumstances. 100 L.Ed.2d at 393. These situations are used to illustrate the fundamental constitutional vice of a capital sentencing procedure in which "a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death." 100 L.Ed.2d at 394. Stressing that "it would certainly be the height of arbitrariness to allow or require the imposition of the death

penalty under [these conditions]," 100 L.Ed.2d at 393, the Court concludes that "if the [*Mills*] petitioner's interpretation of the sentencing process (used in his case) is correct, " 'the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett* [*v. Ohio*, 438 U.S. 586 (1978), and makes] it . . . our duty to remand this case for resentencing.' " 100 L.Ed.2d at 394, *quoting Eddings v. Oklahoma*, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring).

It is at this point, and only at this point, in the *Mills* Court's analysis that the ambiguity of the jury instructions and the verdict form in *Mills* is taken up. The reason for taking it up, as the Court explains, is to resolve "[t]he critical question . . . whether petitioner's interpretation of the sentencing process [just described and found to entail a "plain violation of *Lockett*"] is one a reasonable jury could have drawn from the instructions . . . and . . the verdict form." 100 L.Ed.2d at 394. Thus, the instructional ambiguity in *Mills* was not -- as the respondent now contends -- any part of the source of the constitutional violation condemned in that case. The instructional ambiguity was pertinent only to the secondary inquiry whether Mills' death sentence could be *saved* from invalidation under *Lockett* by the existence of an alternative possible interpretation of Mills' jury instructions and verdict form. The *Mills* opinion simply could not be clearer on this point. It says in plain words that:

> If the jury understood the verdict form as the [Maryland] Court of Appeals asserted it should have, then every time it marked 'no' beside a mitigating circumstance it indicated its unanimous conclusion that petitioner [Mills] had not proved the mitigating facts by a preponderance of the evidence, and thus . . . [no *Lockett* violation occurred]. On the other hand, if the jury understood that it should mark 'no' when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were prevented from considering 'factors which may call for a less severe penalty,'

> *Lockett v. Ohio*, 438 U.S. at 605, and petitioner's sentence cannot stand.

100 L.Ed.2d at 395.

Respondent's torturous effort to rewrite *Mills* as a case of unconstitutionally ambiguous jury instructions is particularly indefensible for two reasons:

First, far from distinguishing *Mills*, "the absence of ambiguity in the sentencing instructions [in the present *McKoy* case]" (Brief for Respondent at 17) simply eliminates the ground of the 5-to-4 division of the Court in *Mills*. Chief Justice Rehnquist's dissenting opinion in *Mills* did not take issue with the majority's conclusion that *Lockett v. Ohio* -- along with *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Hitchcock v. Dugger*, 481 U.S. ___, 95 L.Ed.2d 347 (1987) -- condemned a capital sentencing procedure in which "a single juror's holdout vote against finding the presence of a mitigating circumstance" precluded the entire jury from considering that circumstance in mitigation. *Mills*, 100 L.Ed.2d at 394. The Chief Justice disagreed only with the *Mills* Court's answer to the "question . . . whether a reasonable juror operating under the trial court's instructions would have considered [Mills'] . . . evidence of mitigating circumstances *in a constitutional manner*" -- that is, whether "a reasonable juror [would] understand that, to mark 'no' to each mitigating factor on the sentencing form, all twelve jurors must agree." 100 L.Ed.2d at 406 (Rehnquist, C.J., dissenting) (emphasis added). Since the respondent here concedes that the instruction in *McKoy* unambiguously forbade the entire jury to give any sentencing consideration whatsoever to mitigating evidence found sufficient to establish a particular mitigating factor by eleven but not all twelve jurors (even though the twelfth juror might have found *another* mitigating factor whose consideration was *also* precluded by the lack of jury unanimity as to that factor, and might have concurred with

the other eleven jurors in thinking that McKoy deserved to live), the respondent's emphasis upon the "nonambiguity" of the *McKoy* instructions deprives the respondent even of the support of the dissenting opinion in *Mills*.

Second, respondent's interpretation of *Mills* makes that case stand for a sweeping proposition that North Carolina (and every other State that uses the death penalty) would surely leap to disavow as soon as it is critically examined. According to the respondent, Maryland was constitutionally permitted in *Mills* either to allow or to forbid a single juror's holdout vote to preclude the jury from considering mitigation, but, because the *Mills* jury instructions were ambiguous as to which of these two, equally constitutional procedures the jury should follow, Mills' death sentence was unconstitutional. Thus, unclarity concerning mere state-law issues in capital sentencing instructions (and, by the same token, any unclarity concerning mere state-law issues in the guilt-phase instructions at a capital trial, *see Beck v. Alabama*, 447 U.S. 625 (1980)), would be subject to federal constitutional review and invalidation. Despite the settled rule that *errors* of state law do not, as such, rise to federal constitutional dimension, *see Barclay v. Florida*, 463 U.S. 939 (1983), *ambiguity* as to whether errors of state law have occurred make a state court's judgment of death federally unconstitutional.

Obviously, this is not what *Mills* holds. *Mills* holds what it says it holds: that "if the [*Mills*] jury understood that it should mark 'no' when it failed to agree unanimously that a mitigating circumstance existed, then some jurors were [unconstitutionally] prevented from considering 'factors which may call for a less severe penalty.' " 100 L.Ed.2d at 395, *quoting Lockett*, 438 U.S. at 605. *Mills* accordingly controls here and, to paraphrase Justice White's concurring opinion in *South Carolina v. Gathers*, ___ U.S. ___, 57 U.S.L.W. 4629, 4631 (June 12, 1989): "Unless . . . [*Mills*] is to be overruled, the judgment below must be . . . [reversed]."

B. MITIGATING EVIDENCE MAY NOT CONSTITUTIONALLY BE DECLARED "IRRELEVANT" SIMPLY BECAUSE A SINGLE HOLDOUT JUROR FAILS TO FIND THE MITIGATING FACTOR THAT THE EVIDENCE IS OFFERED TO PROVE.

Respondent similarly ignores the commands of both precedent and reason in its attempt to distinguish *Mills* on the ground that under North Carolina law, "[e]vidence insufficiently reliable to convince the entire jury of the existence of a mitigating factor becomes, in effect, legally irrelevant for further use in the sentencing proceeding." (Brief for Respondent at 20-21) If, as the respondent urges, a state-law "finding that evidence is irrelevant for further use in a sentencing process need not be specifically denominated 'legally irrelevant' when that is the result of the decision" (*id.* at 21 n.6), then the holding of the Supreme Court of South Carolina in *Skipper v. South Carolina*, 476 U.S. 1 (1986), was unmistakably that Skipper's good behavior in jail was "legally irrelevant" in mitigation under South Carolina's death-sentence procedure; and the holding of the Texas Court of Criminal Appeals in Johnny Paul Penry's case was unmistakably that Penry's mental retardation was "legally irrelevant" in mitigation under Texas' death-sentencing procedure except insofar as it went "to the question whether he was capable of acting 'deliberately,' " *Penry v. Lynaugh*, ___ U.S. ___, 57 U.S.L.W. 4958, 4963 (June 26, 1989). Skipper's and Penry's death sentences were, of course, invalidated by this Court precisely because the state courts had precluded their sentencers' consideration of this "legally irrelevant" mitigating evidence. Indeed, Sandra Lockett's mitigating evidence was legally irrelevant under Ohio law except insofar as it went to the three specific mitigating circumstances enumerated by the governing Ohio death penalty statute; and that, again, was why the Ohio statute created an unconstitutional "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.

Respondent contends that:

> *Skipper v. South Carolina*, 476 U.S. 1 (1986) does not preclude . . . [the North Carolina Supreme Court's] relevancy determination [that "[i]f all jurors do not agree on a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes"]. In *Skipper*, this Court held that a state could not declare as irrelevant and substantively inadmissible categories of evidence which arguably support a basis for a sentence less than death. The relevancy determination required here is of an entirely different character. It involves the continued viability of evidence which failed to survive a traditional burden of proof standard.

(Brief for Respondent at 21-22). This argument, attempting to distinguish a *substantive* state-law determination of irrelevancy from a *procedural* state-law determination of irrelevancy, fails for three independently sufficient reasons.

First, under the procedure used to impose petitioner's death sentence, a single juror's failure to join his or her eleven compeers in finding a particular mitigating circumstance did not have to be based at all on a determination that the mitigating circumstance was factually unproved. It could be based instead on the determination that, in this one juror's view, the circumstance offered by the petitioner was factually proved but was not substantively mitigating. The jury instructions below explicitly required the jurors to find not only the factual existence of each nonstatutory mitigating circumstance but also whether that circumstance *was mitigating*. J.A. 11-13. The jurors were instructed to make the same determination with regard to the catch-all statutory mitigating circumstance and the statutory mitigating circumstance of the defendant's age. *Id.* Thus, if a single juror thought that any of these circumstances, although amply proved in fact, was *not mitigating*, his or her conclusion to that effect would compel the

entire jury to give "no weight at all" to the circumstances.[1] *Penry*, 57 U.S.L.W. at 4972 (Scalia, J., dissenting). As the respondent readily concedes, a circumstance blackballed by one of twelve jurors in this fashion[2] simply "cannot be used during the final weighing and balancing steps of . . . [the North Carolina] death penalty sentencing procedure." (Brief for Respondent at 19) The real difference between the preclusion of mitigating evidence prohibited by this Court in *Skipper* and the preclusion of mitigating evidence permitted by the court below is that in Skipper's case the preclusion occurred in open court, on the record, pursuant to the rule of law, and subject to appellate review, whereas in McKoy's case the preclusion was authorized to be made by a lone holdout juror operating in the secrecy of the jury room, for undisclosed and unreviewable reasons. That difference lends no constitutional credentials to McKoy's death sentence.

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1 Respondent implies that *voir dire* examination of prospective jurors can alleviate the possibility of empaneling a juror who would preclude consideration of categories of mitigating evidence. Brief for Respondent at 40, citing *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902 (1976). However, inasmuch as this Court has repeatedly held that unconstitutional jury instructions cannot be saved by the arguments of counsel, *see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978); *Carter v. Kentucky*, 450 U.S. 288, 304 (1981), it follows *a fortiori* that instructions restricting the consideration of mitigating evidence in violation of *Lockett* cannot be saved by the possibility of adroit *voir dire* examination by defense counsel. Moreover, it is well settled under North Carolina law that the extent of *voir dire* is left to the discretion of the trial judge, *e.g., State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988) (reversal of the trial judge is warranted only upon a showing that his or her rulings are so arbitrary that they could not have been the result of a reasoned decision), and many trial judges severely limit defense counsel's *voir dire* questioning of prospective jurors, *see, e.g., State v. Johnson*, 317 N.C. 343, 382-83, 346 S.E.2d 596, 618 (1986) (trial court did not abuse its discretion in refusing to allow defense counsel to ask prospective jurors whether they would take evidence of child abuse and parental neglect into consideration in the sentencing process); *State v. Allen, supra*, 322 N.C. at 189-91, 367 S.E.2d at 634 (trial court did not abuse its discretion in refusing to allow defense counsel to ask whether a prospective juror believed that a person can be so mentally ill as to be incapable of knowing the nature of his act, or to ask whether a prospective juror believed that a person could never have a mental condition so severe as to prevent him from knowing right from wrong). Thus, North Carolina *voir dire* practice manifestly does *not* guarantee that no juror can be empaneled who, on the basis of his or her personal beliefs, may preclude the entire jury's consideration of categories of pertinent mitigating evidence.

2 Under North Carolina practice, the jury must be unanimous only to find a mitigating circumstance, not to reject a mitigating circumstance. A single juror's vote suffices to reject any mitigating circumstance and thereby to preclude the entire jury's consideration of the evidence going to show that circumstance. Thus, in exactly the same way that any fraternity member can exclude a pledge from the fraternity by one blackball vote, any single juror can "blackball" the consideration of one or more mitigating circumstances. "Blackball" is not, as respondent suggests, "a crude and emotionally laden term" (Brief for Respondent at 39); it is an apt one.

Second, respondent's attempted distinction between *substantive* preclusion of mitigation in *Skipper* and *procedural* preclusion of mitigation in the present case assumes that a State has greater power to erect procedural barriers to the consideration of defensive evidence than to shape the substantive content of its criminal law. Precisely the converse is true, of course -- in regard to both guilt and punishment. *Compare Powell v. Texas*, 392 U.S. 514 (1968) *with Chambers v. Mississippi*, 410 U.S. 284 (1973), *and Olden v. Kentucky*, ___ U.S. ___, 102 L.Ed.2d 513 (1988) (*per curiam*); *compare Barefoot v. Estelle*, 463 U.S. 880 (1983) *with Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*).

Third, the precise form of procedural preclusion involved in the present case was examined and held unconstitutional in *Mills*. In overturning Ralph Mills' death sentence, the Court said:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio*, . . . ; *Hitchcock v. Dugger*, . . . ; by the sentencing court, *Eddings v. Oklahoma*, . . . ; or by an evidentiary ruling, *Skipper v. South Carolina*, ... The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings v. Oklahoma*, 455 U.S. at 117 n* (O'Connor, J., concurring).

100 L.Ed.2d at 394.[3]

[3] Contrary to respondent's submission (Brief for Respondent at 18-19, 20-21) and to the reasoning of the majority of the North Carolina Supreme Court below (J.A. 71, 323 N.C. at 40-41, 372 S.E.2d at 33), footnote 7 of the *Mills* opinion does not authorize a state court to avoid this result by the facile expedient of labeling mitigating evidence "not legally relevant" whenever a single juror fails to find the mitigating circumstance that the evidence is offered to prove. Footnote 7 says that, "no one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered 'irrelevant' by one holdout vote." Far from implying that such an argument would succeed if made, the footnote implies that the argument is too extravagant to make. And so it is, of course. Except in an effort to transmute footnote 7 into a loophole in *Mills*, no lawyer versed in Anglo-American evidentiary traditions would ever think of using the word "irrelevant" to describe "evidence which [has] failed to survive a traditional burden of proof standard." (Brief for Respondent at 22) A burden of proof is concerned with "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue," *In re Winship*, 397 U.S. 358, 364 (1970); it has to do with the sufficiency of evidence, not with the admissibility or relevance of evidence. When the prosecutor presents eyewitness testimony identifying a defendant as the perpetrator of a crime but this evidence fails to convince the jury beyond a reasonable doubt, the evidence is not thereby retrospectively rendered "irrelevant" in ordinary legal parlance; it is simply insufficient to convict. When a defendant testifies that he was forced at gunpoint to participate in a robbery but the jury does not believe him, his testimony does not thereby become "irrelevant" to the defense of duress; it was simply unconvincing or unpersuasive or insufficient to make out the defense. "Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy" in any conventional sense of the word "relevancy," as Chief Justice Exum pointed out below. J.A. 88, 323 N.C. at 55-56, 372 S.E.2d at 45 (dissenting opinion). It is for this reason that respondent can take no comfort in the observation that "[t]he cases in which this Court has addressed issues concerning the introduction and consideration of a defendant's evidence proffered in mitigation have consistently referred to 'relevant mitigating evidence.' " (Brief for Respondent at 21) "Relevant," as this Court has used the term, describes " 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Eddings v. Oklahoma*, *supra*, 455 U.S. at 110, *quoting Lockett v. Ohio*, *supra*, 438 U.S. at 604. As the *Eddings* opinion is at pains to point out, it has nothing whatsoever to do with whether the sentencer is persuaded or unpersuaded by the evidence.

C. THERE IS NO CONSTITUTIONALLY ACCEPTABLE JUSTIFICATION FOR PERMITTING A SINGLE JUROR TO PRECLUDE THE ENTIRE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES.

Relitigating *Mills*, respondent offers several purported justifications for permitting "a single juror's holdout vote against finding the presence of a mitigating circumstance" to preclude consideration of the underlying mitigating evidence by the whole jury. All fail.

Respondent first says that the single juror blackball is merely North Carolina's way of "placing a burden of persuasion as to mitigating factors on the defendant." (Brief for Respondent at 31; *see id.* at 31-35) We have already shown at pages 6 and 7 above that this is an inaccurate description of the power given to a single juror by the instructions in petitioner's case, because those instructions permitted one juror to preclude the consideration by all twelve *not only of circumstances which a lone juror found to be factually unproved, but also of circumstances which a lone juror found to be*

factually proved but did not view as mitigating. If, for example, one juror concurred with the other eleven in finding as a fact that petitioner Dock McKoy was sixty-five years old -- as he indisputably was -- but believed, contrary to the other eleven jurors, that the age of 65 was not mitigating, the entire jury was precluded from considering McKoy's age in mitigation. And this was so even though the holdout juror on the mitigating circumstance of age believed that McKoy's life should be spared on account of some other circumstance -- such as McKoy's poor physical health -- which all twelve jurors found to be factually established but which a different holdout juror deemed not mitigating. Such a process of decisionmaking cannot be defended on the ground that "[t]he unanimity burden guarantees that any factors utilized . . . as mitigating . . . are established with reasonable certainty." (Brief for Respondent at 34)

Nor can it be defended, as respondent seeks to do, by asserting that "[t]he unanimity requirement . . . best ensures that only reliable information is used in the sentencing determination." (Brief for Respondent at 36; *see id.* at 35-39) A single juror's belief that the age of 65 is not mitigating can hardly be viewed as more "reliable" than eleven jurors' beliefs that the age of 65 *is* mitigating. It cannot be regarded as more "accurate" (Brief for Respondent at 36), more "rational[]," *id.* at 38, or more "objective," *id.* at 19. Respondent makes much of the notion that "[g]roup deliberation is enhanced by the requirement that the jury agree unanimously on factors . . . in . . . mitigation" (Brief for Respondent at 37), but fails to mention that under the strange form of unanimity requirement which it is defending, the jury is required to be unanimous only to find a mitigating circumstance, not to reject one. The traditional unanimity requirement -- under which, for example, a jury is required to be unanimous either to convict or to acquit -- does indeed promote group deliberation; but it does so by requiring that the jurors continue to debate with one another until they achieve consensus. In stark contrast, the procedure used to sentence McKoy to die permitted

any one juror to end the debate -- and to preclude the consideration of a given mitigating circumstance -- simply by refusing unilaterally to find that circumstance. A sentence so imposed does not "reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original).

Citing the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. ___, ___, 101 L.Ed.2d 155, 169 (1988), to the effect that " *'Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors' " (Brief for Respondent at 22), respondent next argues that a procedure which forbids all twelve jurors to consider any mitigation rejected by one of them is constitutional because it "simply pertains to the state ensuring that jury consideration of mitigating evidence not be undirected or unfocused, but rather channelled in an effort to achieve a rational sentencing determination." *Id.* This appears to be an argument that Justice White's plurality opinion in *Franklin* -- sixteen days after *Mills* was decided -- overruled *Mills sub silentio*, despite the facts that the *Franklin* plurality opinion does not discuss *Mills* and that Justice White concurred in *Mills*. The Court's subsequent decision in *Penry v. Lynaugh*, *supra*, squarely holds that the same Texas sentencing procedure which was before the Court in *Franklin* could not constitutionally be used to preclude consideration of Penry's evidence of mental retardation and childhood abuse in mitigation under the guise of "channelling" that evidence through Texas' three "special issues," *Penry*, 57 U.S.L.W. at 4962-65, and the dissenters in *Penry* disagreed only because they believed that this evidence "could be considered (and, of course, given effect in answering . . . [Texas' three special-issue] questions)," *id.* at 4972 (Scalia, J., dissenting). Notably, the dissenters were careful to point out that, under their view, "there remains available . . . the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions . . . [that Texas law] poses, and hence

could not be considered." *Id.* But that is exactly the situation presented here, because the North Carolina Supreme Court has upheld petitioner's death sentence on the theory that "[i]f all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes." J.A. 70, 323 N.C. at 41, 372 S.E.2d at 34. The short of it is that, as Chief Justice Exum pointed out in dissent below, "Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decisionmaking stage is quite another. . . . [The *Franklin* plurality opinion] permits the former; *Mills* prohibits the latter." J.A. 90, 323 N.C. at 56-57, 372 S.E.2d at 46.

Finally, respondent argues that "[t]he application of binding evidentiary standards" helps "to promote reliability and uniformity among cases in the jurisdiction" and is necessary to prevent a return to the "totally unguided juror discretion" condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). (Brief for Respondent at 28-29) This is not a new argument, nor a colorable one in the light of the Court's post-*Furman* case law. The Ohio statute invalidated in *Lockett* was premised on the same misunderstanding of *Furman*. *See* 438 U.S. at 599 n.7. "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating facts, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). When the Florida Supreme Court forbade the consideration of nonstatutory mitigation in *Cooper v. State*, 336 So.2d 1133 (1976), upon the explicit ground that this was necessary to prevent unguided juror discretion, *see id.* at 1139 n.7, the result was held unconstitutional by a unanimous Court in *Hitchcock v. Dugger*, 481 U.S. ___, 95 L.Ed.2d 347 (1987). Respondent's "unguided discretion" argument was most recently rejected by the Court

in *Penry v. Lynaugh*, 57 U.S.L.W. at 4964-65, and the dissenters in *Penry* disagreed with the Court only because they viewed Texas' special-issue procedure as "a desirable means of 'focus[ing] the jury's objective consideration of the particularized circumstances' . . . [so as] 'to achieve a more rational and equitable administration of the death penalty.' " *Id.* at 4973 (Scalia, J., dissenting). No similar claim can be made for a procedure which permits the idiosyncratic views of one juror as to what is proved and what is mitigating to preclude the whole jury from considering evidence in mitigation.[4]

The irony of respondent's argument is that it invokes a supposed concern "to achieve a more rational and equitable administration of the death penalty" (Brief for Respondent at 15) to defend a practice which has just the opposite result. Permitting a single juror to prevent the entire jury from giving any consideration at all to mitigating evidence -- including whole categories of mitigating evidence that the lone juror does not believe to be mitigating -- defeats, rather than advances, a rational and equitable administration of the death penalty. "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' the jury must be able to

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[4] On this point, respondent tries to have it both ways. It praises "the value of the jury as a representative cross-section of the community in [capital] sentencing" (Brief for Respondent at 38) but analogizes North Carolina's single-juror veto to the capital sentencing procedures "of Florida or Indiana where one judge can override the considered opinion of up to twelve other persons." *Id.* at 39. The analogy is trebly flawed. *First*, the justification for *judicial* sentencing in capital cases is that it "should lead . . . to greater consistency in the imposition at the trial level of capital punishment, since a trial judge is more experienced than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion). A North Carolina holdout juror has no special sentencing experience or expertise of this sort. *Second*, in upholding the Florida judicial sentencing procedure, this Court noted that the standard of review adopted by the Florida Supreme Court was "crucial" to its constitutionality. *Dobbert v. Florida*, 432 U.S. 282, 295 (1977). Under that standard, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id. quoting Tedder v. State*, 322 So.2d 908, 916 (Fla. 1975). No such exacting standard controls a lone juror's blackball of mitigating evidence under North Carolina law. *Third*, under Florida and Indiana practice, the jury's sentencing recommendation does *not* foreclose the trial judge from considering evidence in mitigation; the trial judge must consider such evidence whether he or she accepts or rejects the jury's verdict.

consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Penry v. Lynaugh*, 57 U.S.L.W. at 4965. There is simply no support for the idea that giving a single juror the power to preclude consideration of such evidence whenever he or she disagrees with the eleven other jurors improves "the objectivity of the sentencing process." (Brief for Respondent at 28)[5] To the contrary, this procedure allows the unregulated and unexplained subjective view of one juror to set at naught the settled Eighth Amendment rule that "the sentencer must be permitted to consider all mitigating evidence." *Mills v. Maryland, supra*, 100 L.Ed.2d at 400.

[5] "[J]ury deliberations are by nature secret, and the mental processes or individual jurors equally recondite." *Mills v. Maryland, supra*, 100 L.Ed.2d at 407 (Rehnquist, C.J., dissenting).

CONCLUSION

Respondent has conceded that under the instructions given to petitioner's jury a mitigating circumstance rejected by a single juror could "[]not be used during the final weighing and balancing steps of . . . [the] death sentencing procedure." (Brief for Respondent at 19) No other State than North Carolina permits a lone juror to blackball consideration of mitigating evidence, and no legitimate rationale supports North Carolina's unusual procedure. While there is no "one right way for a State to set up its capital punishment scheme," *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), there are wrong ways. The way used by North Carolina to sentence petitioner to death was expressly held unconstitutional in *Mills*. Accordingly, Dock McKoy's death sentence must be vacated.

Respectfully submitted,

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